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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 J&J SPORTS PRODUCTIONS INC.,

10 Plaintiff,

11 v.

12 NIKOLAOS J. TSOULOUHAS, et al.,

13 Defendants.

C08-695Z

ORDER

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15 THIS MATTER comes before the Court on plaintiff's motion for default judgment,  
16 docket no. 13. Having reviewed the papers filed in support of the motion, the Court enters  
17 the following Order.

18 **Background**

19 Plaintiff J&J Sports Productions, Inc. is a closed-circuit distributor of sports and  
20 entertainment programming. Gagliardi Decl. at ¶ 3 (docket no. 13-5). In this action, plaintiff  
21 alleges that, on May 6, 2006, defendant Cascade Restaurant and Pizza Inn, a commercial  
22 establishment located in Mount Vernon, Washington, exhibited a portion of a program titled  
23 "Danger Zone: The Oscar De La Hoya vs. Ricardo Mayorga World Super Welterweight  
24 Championship Fight," to which plaintiff had exclusive nationwide distribution rights and for  
25 which defendants did not pay plaintiff a sub-licensing (pay-per-view) fee. Complaint at ¶ 12  
26 (docket no. 1); Gagliardi Decl. at ¶¶ 3 & 7; Yell Affidavit, Exh. 2 to Huppert Decl. (docket

1 no. 13-6). Plaintiff has filed declarations indicating that copies of the summons and  
2 complaint were delivered to Kathy Tsoulouhas, the owner and/or manager of Cascade  
3 Restaurant and Pizza Inn and spouse of defendant Nikolaos Tsoulouhas, on two occasions at  
4 different locations, namely the Mount Vernon address of the restaurant and a Bellingham  
5 residence. See Declarations of Service (docket nos. 3, 5, & 6). Defendants have not  
6 appeared or filed a responsive pleading. Upon plaintiff's motion, the Clerk entered default  
7 against both defendants. Order (docket no. 11).

### 8 **Discussion**

9 Plaintiff alleges that defendants have violated both 47 U.S.C. § 553 and 47 U.S.C.  
10 § 605, and seeks statutory damages under each statute. Although the Ninth Circuit has not  
11 yet addressed the issue, the Third and Seventh Circuits, as well as a District Court in the  
12 Tenth Circuit, have concluded that the remedies of Sections 553 and 605 are mutually  
13 exclusive. See Kansas City Cable Partners v. Espy, 250 F. Supp. 2d 1296, 1302-03 (D. Kan.  
14 2003) (holding that “§ 605 applies to radio signals . . . transmitted through the air, and § 553  
15 applies to radio communications transmitted via a wire or cable system” (citing TKR Cable  
16 Co. v. Cable City Corp., 267 F.3d 196 (3d Cir. 2001), and United States v. Norris, 88 F.3d  
17 462 (7th Cir. 1996))); see also Garden City Boxing Club, Inc. v. Stone, 285 F. Supp. 2d 447,  
18 452 (D. Del. 2003) (“Congress created § 553 to address an enforcement gap created by the  
19 1968 modification of § 605, which rendered § 605 applicable only to satellite transmissions  
20 insofar as they are actual airborne transmissions. . . . Once a satellite transmission reaches a  
21 cable system's wire distribution phase, it is subject to § 553 and is no longer within the  
22 purview of § 605.” (quoting TKR Cable, 267 F.3d at 205-07)). In Stone, Joseph Gagliardi,  
23 who is currently the President of J&J Sports Productions, Inc., provided an affidavit that the  
24 defendant in that case sought to strike. 285 F. Supp. 2d at 453. Mr. Gagliardi is therefore  
25 presumed to know of the Stone decision, and plaintiff's failure to cite this authority or to  
26 acknowledge the case law requiring an election between the statutes in question constitutes

1 questionable behavior, especially in light of the Delaware District Court's previous  
2 admonition. See id. ("Even more disturbing, however, is the parties' apparent lack of  
3 research on the interplay of §§ 553 and 605, and the Third Circuit precedent on this matter,  
4 since neither party cited nor discussed the very relevant TKR Cable decision.").

5 Although plaintiff might have offered the De La Hoya / Mayorga program via both  
6 cable and satellite transmission, plaintiff has provided no evidence concerning the format in  
7 which defendants allegedly intercepted or received the communication. Thus, the Court  
8 cannot determine which of the statutes, Sections 553 or 605, apply in this case. Although  
9 both statutes authorize an award of statutory damages, they provide different limits. Section  
10 553 permits recovery of not less than \$250 and not more than \$10,000, or up to \$50,000 in  
11 the case of willful violation, while Section 605 sets statutory damages at a minimum of  
12 \$1,000 and a maximum of \$10,000, or \$100,000 for willful violations. See 47 U.S.C.  
13 §§ 553(c)(3)(A) & (B) and 605(e)(3)(C)(i) & (ii). Because plaintiff has not made an  
14 adequate showing concerning which of the two statutes was violated, the Court will award  
15 damages only under the statute with lower limits, namely Section 553.

16 Plaintiff asserts that it is entitled to statutory damages at the maximum amount for  
17 willful violations. Plaintiff, however, presents no evidence other than the single broadcast on  
18 May 6, 2006,<sup>1</sup> during which its investigator observed the presence of only 24 or fewer  
19 patrons, none of whom were required to pay a cover charge. Yell Affidavit at 1. Plaintiff  
20 offers no estimate of the residential rate for the program at issue, but assuming it was as  
21 much as \$100 per person, the most that plaintiff can support in actual damages is \$2,400.  
22 Compare Kingvision Pay-Per-View Ltd. v. Villalobos, 554 F. Supp. 2d 375, 382-83  
23 (E.D.N.Y. 2008) (adopting a residential rate of \$54.95 per customer). An award of statutory  
24 damages in the amount of \$50,000 or \$100,000 is simply unsupported by this record.

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26 <sup>1</sup> Plaintiff has provided a photograph of a sign purporting to advertise the broadcast at issue, but plaintiff has  
offered no foundation for the evidence, for example when and where it was taken, and the Court assigns it  
minimal probative value.

1 Compare id. at 383-84 (recognizing that repeated violations, advertising for the pirated  
2 broadcast, charging a cover fee, or charging a premium for food and drinks are factors  
3 indicating willfulness, and awarding “enhanced” damages of \$10,000 “as a deterrent for  
4 future violations” based on evidence that the defendants “pirated at least one other event”).

5 Moreover, although intercepting a signal and exhibiting a program without  
6 authorization, as well as defaulting in litigation of this nature, constitute evidence of  
7 willfulness, id. at 383, a variety of innocent explanations might exist for defendants’  
8 behavior. Plaintiff itself acknowledges that a commercial establishment might  
9 inappropriately obtain pay-per-view programming at a residential rate, Gagliardi Decl. at ¶ 8,  
10 and at least one previous case has revealed circumstances other than willfulness that might  
11 explain such an arrangement. See Stone, 285 F. Supp. 2d at 449 (finding that a genuine issue  
12 of material fact concerning willfulness was created by defendant’s averment that a residential  
13 account was created inadvertently by a Radio Shack employee when defendant provided a  
14 personal credit card and associated home address to complete the installation of the satellite  
15 equipment at issue). Absent additional evidence of defendants’ disregard for federal law, the  
16 Court is unpersuaded that defendants’ single violation was willful.

17 In addition to the statutory damages described earlier, plaintiff also requests \$1,500 in  
18 damages for the tort of conversion, \$750 in attorney’s fees, and \$445 in costs. With regard to  
19 the damages for conversion, plaintiff provides absolutely no proof to support its estimate. As  
20 to attorney’s fees, plaintiff offers only a parenthetical in counsel’s declaration, indicating  
21 four hours spent at a rate of \$150 per hour, and fails to explain what work was performed,  
22 who performed the work, and what legal experience the individuals who performed the work  
23 have. See Villalobos, 554 F. Supp. 2d at 384-85 (reducing the attorney’s fees requested  
24 because, although counsel detailed the work done, she failed to identify the attorneys who  
25 worked on the matter or their experience level). The Court notes that it previously dismissed  
26 this case after counsel failed to comply with the Order requiring a joint status report and then

1 did not respond to the Order directing counsel to show cause for such failure. See Minute  
2 Order (docket no. 4); Order (docket no. 7). To the extent that plaintiff has included within  
3 the estimate of time expended on this case the effort spent preparing its motion to vacate  
4 dismissal, the request is improper. The Court has reviewed the filings in this case that  
5 required counsel's attention, and has arrived at an amount it believes reflects a reasonable  
6 attorney's fee. Costs will be awarded.

7 **Conclusion**

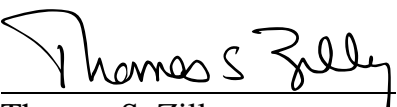
8 For the foregoing reasons, plaintiff's motion for default judgment, docket no. 13, is  
9 GRANTED IN PART and DENIED IN PART. The Court awards plaintiff the following  
10 amounts:

11	(1) Statutory Damages for Violation of 47 U.S.C. § 553:	\$2,400
12	(2) Damages for Tort of Conversion:	\$ 0
13	(3) Attorney's Fees:	\$ 500
14	(4) Costs:	\$ 445
15		<u>\$3,345</u>
16		TOTAL: \$3,345

17 The Clerk is directed to enter judgment in favor of plaintiff and against defendants  
18 Nikolaos J. Tsoulouhas and Cascade Pizza and Italian Cuisine Restaurant III LLC doing  
19 business as Cascade Restaurant and Pizza Inn III in the amount of \$3,345.00, and to send a  
20 copy of this Order to all counsel of record.

21 IT IS SO ORDERED.

22 DATED this 23rd day of December, 2008.

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Thomas S. Zilly  
United States District Judge